

Citimortgage, Inc. v Petrush
2018 NY Slip Op 32202(U)
August 30, 2018
Supreme Court, Suffolk County
Docket Number: 029529/2013
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X

CITIMORTGAGE, INC.,

Plaintiff,

-against-

JOSEPH G. PETRUSH and HOLLY PETRUSH,

Defendants.

X-----X

INDEX NO.:029529/2013

MOT. SEQ. NO.:002-MG; CASEDISP

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Upon the following papers numbered 1 to 21 read on this Motion/Order to Show Cause for a Judgment of Foreclosure and Sale; Notice of Motion/ Order to Show Cause and supporting papers 1-10; ~~Notice of Cross Motion and supporting papers 9~~; Answering Affidavits and supporting papers 11-13; Reply Affidavits and supporting papers 14-21; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. no.:002) by Plaintiff for an order and judgment confirming the report of the Referee and for the relief demanded in the complaint, judgment of foreclosure and sale, an extra allowance, pursuant to the CPLR, in addition to taxable costs, disbursements and reasonable attorneys' fees is granted; and it is further

ORDERED that the relief requested by Defendants in opposition to Plaintiff's motion, requesting a stay of this action pursuant to CPLR §2201, and a rejection of the affidavit of Lindsay Hodges, Vice President-Documents Control Citimortgage, Inc., pursuant to CPLR §2309 is denied in its entirety.

Concise Case History

This is a matter seeking foreclosure and sale of residential real property situate in Bay Shore, Suffolk County, New York. On January 12th, 2006, mortgagor Joseph G. Petrush and Holly Petrush ("Defendants") closed on a first mortgage with mortgagee Plaintiff secured by a note and mortgage on 1402 Potter Boulevard, Bay Shore, NY 11706. On April 19th, 2007,

Defendants closed on a second mortgage with Plaintiff. The first and second mortgages were consolidated by agreement dated April 19th, 2007. Defendants ceased payment on the consolidated loan thereafter and a notice of default dated January 24th, 2011 was sent to Defendants.

On November 6, 2013 Plaintiff commenced its foreclosure case against Defendants. Defendants answered that complaint. Defendants' Counsel made general denials and stated numerous affirmative defenses. Defendants' Counsel has represented Defendants throughout this case and now has responded in opposition to the instant motion.

It is noted that despite having had ample opportunity to review the case record in preparation of the verified answer, Defendants heretofore raised no objection to the affidavit of Lindsay Hodges, Vice President of Document Control with Plaintiff Citimortgage, Inc..

Court records indicate that on March 31st, 2014 a foreclosure conference was held in this case. Defendants defaulted and never appeared for the scheduled conference; nor did their Counsel.

On April 22, 2016, summary judgment was granted Plaintiff, Defendants' answer was stricken and Plaintiff's request for an order of reference appointing a referee to compute was granted.

Plaintiff now moves for, *inter alia*, judgment of foreclosure and sale. Defendants oppose that motion, requesting: (1) Stay of the Action pursuant to CPLR §2201, alleging Defendants are submitting a modification application; and, (2) Dismissal of Plaintiff's Factual Affidavit of Lindsay Hodges as deficient pursuant to CPLR §2309 (c).

The Court, for reasons discussed herein, grants the relief requested by Plaintiff in its motion and denies the relief requested by the Defendants.

Summary Judgment

The granting of a summary judgment motion "is the procedural equivalent of a trial" (*Crowley's Milk Co. v. Klein*, 24 AD2d 920, 264 NYS2d 680 [3d Dept 1965]; see *Red River Living Center, LLC v. ADL Data Systems, Inc.*, 98 AD3d 724, 950 NYS2d 179 [2d Dept 2012]).

"To obtain summary judgment, it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law directing judgment in his favor, and

he must do so by tender of evidentiary proof in admissible form”
(*Deutsche Bank Natl. Trust Co. v. Brewton*, 142 AD3d
683,685, 37 NYS3d 25 [2d Dept 2016] NY Slip Op. 05906).

In the case at bar, summary judgment was granted to Plaintiff in April 2016. Judge Patrick Sweeney, upon review of the evidence presented, found no issue of material fact to warrant denial of that motion.

Defendants oppose Plaintiff’s motion for judgment and sale in a case which has already been decided as a matter of law; over a year after summary judgment was granted.

It is noted that the order of summary judgment also struck Defendants’ answer; rendering same a nullity.

Order granting mortgagee’s motion for summary judgment and for order of reference in foreclosure action was not appealable, where order was entered upon mortgagor’s default in opposing motion (*Wells Fargo Bank, N.A. v. Syed*, 160 AD3d 914, 76 NYS3d 63 [2d Dept 2018] NY Slip Op. 02669]).

Defendants come before the Court asserting defect and evidentiary insufficiency in a filed document; which, they contend is sufficiently serious to deny Plaintiff’s judgment of foreclosure and sale.

The Court notes that Defendants do not appeal from the order of summary judgment. The Court also notes that Defendants’ answer was struck. Defendants appear to be attempting to gain an opportunity to relitigate, renew and reargue without appeal from summary judgment.

CPLR §2309 Oaths and Affirmations and RPL §§299 and 299-a

CPLR §2309 provides, in pertinent part:

(c) Oaths and affirmations taken without the state. “An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be

recorded within the state...” (McKinney’s CPLR §2309, NYCPLR §2309 [2018]).

RPL §299 provides, in pertinent part:

RPL §299. Acknowledgments and Proofs Without the State, but within the United States or any territory, possession, or dependency thereof “The acknowledgment or proof of a conveyance of real property situate in this state, if made (a) without the state but within the United States...at the time when such acknowledgment or proof is taken, has or exercises jurisdiction...may be made before any of the following officers acting within his territorial jurisdiction or within that of the court of which he is an officer:.. 3. A notary public...” (McKinney’s Real Property Law §299, NY Real Prop §299 [2018]).

RPL §299-a provides, in pertinent part:

RPL §299-a. Acknowledgment to conform to the law of New York or of place where taken; certificate of conformity “1. An acknowledgment or proof made pursuant to the provisions of...this chapter may be taken in the manner prescribed either by the laws of the State of New York or...The acknowledgment or proof, if taken in the manner prescribed by such state,...or other place...must be accompanied by a certificate to the effect that it conforms with such laws...” (McKinney’s Real Property Law §299-a, NY Real Prop §299-a [2018]).

The Second Department reversed a denial of summary judgment to a foreclosure Plaintiff for lack of a certificate of conformity per CPLR §2309 (c). The Court distinguished between “a certificate of conformity, (which) speaks to the manner in which a foreign oath is taken whereas a certificate of authentication speaks to the vested power of the individual to administer the oath” (*Midfirst Bank v. Agho*, 121 AD3d 343, 349, 991 NYS2d 623, 628 [2d Dept 2014]).

The Court noted that even if a certificate of conformity were not annexed to the supporting affidavit, that omission is not fatal to the motion and is subject to correction *nunc pro tunc* (see *U.S. Bank N.A. v. Dellarmo*, 94 AD3d 746, 942 NYS2d 122), or pursuant to

CPLR 2001 which permits trial courts to disregard mistakes, omissions, defects or irregularities at any time during an action where a substantial right of a party is not prejudiced [*Id.* at 352, 630], *ref to Matos v. Salem Truck Leasing*, 105 AD3d at 917, 963 NYS3d 366; *Rivers v. Birnbaum*, 102 AD3d at 44, 953 NYS2d 232; *Betz v. Daniel Conti, Inc.*, 69 AD3d at 545, 892 NYS2d 477]). The Court opined, “Thus, even if the certificate of conformity was inadequate or missing, no substantial right of the defendants is prejudiced” (*Midfirst* at 352, 630).

In a Second Department case subsequent to *Midfirst*, the Appellate Division held that a lack of a certificate of conformity was immaterial where an out of state affidavit submitted in support was in substantial compliance with New York State statutory requirements (*Meikle v. Fremont Investment and Loan Corp.*, 125 AD3d 616, 3 NYS3d 393 [2015 NY Slip Op. 00854]).

Similarly, in the case at bar, the absence of a CPLR §2309 (c) certificate of conformity from the affidavit of Lindsay Hodges, Vice President-Documents Control, Citimortgage, Inc., which document was signed before a Kentucky State Notary Public, is not a fatal defect. Upon examination of that affidavit it is found to be in compliance with New York statutory requirements, but for a certificate of conformity. The Court notes that the oath was duly administered and taken before a Notary Public in good standing in the State of Kentucky. The defect does not rise to the level complained of by Defendants. Counsel are directed to Real Property Law §299(1)-(5), which lists officers who may, for the conveyance of New York real property acknowledge the conveyance outside New York.

Based upon the foregoing, the Court denies that relief requested by Defendants that Plaintiff’s factual affidavit supporting its claims of amounts due and owing and affidavit of merit are deficient. The Court notes that Plaintiff in future should insure that his documents are fully compliant with applicable New York statutes in order to avoid unnecessary litigation.

CPLR §2201. Stay (Of Instant Action, Pending the Determination of Defendants’ Eligibility for Mortgage Modification)

“Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just” (McKinney’s CPLR §2201, NYCPLR §2201 [2018]). CPLR §2201 provides that a court may grant a stay of proceedings in a proper case. It is noted that the granting of a CPLR §2201 stay is within the Court’s discretion.

The case most often cited in the Second Department in cases reviewing a CPLR §2201 stay application is a Nassau County case where an employer brought suit against a former employee alleging conversion of funds and the Court granted Plaintiff's motion for a stay pursuant to CPLR §2201 pending completion of a related criminal action (*Zonghetti v. Jeromack*, 150 AD2d 561, 541 NYS2d 235 [2d Dept 1989]). The Court stated that "...a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*Id.* at 563, 237).

The Court has reviewed several Second Department Appellate Division cases involving residential foreclosure actions where a party moved for a CPLR §2201 stay of proceedings. In an action to foreclose a mortgage filed in Kings County, a CPLR §2201 stay was affirmed, the Court was faced with a foreclosure action and the subject property was also the subject of another case to quiet title (*HSBC Bank, USA v. Despot*, 130 AD3d 783, 12 NYS3d 556 [Mem], [2d Dept 2015] Slip Op. 06115). The Court affirmed the trial court stay of the action in order to avoid inconsistent adjudications and preserve judicial resources (*Id.*).

In an action to foreclose a mortgage filed in Nassau County, the Appellate Division found that "...under the circumstances presented, the Supreme Court providently exercised its discretion in denying that branch of the appellant's motion which was to stay a related eviction proceeding, *see* CPLR 2201" (*HSBC Bank USA, N.A. v. Posy*, 98 AD3d 945, 950 NYS2d 579 [Mem] [2d Dept 2012] NY Slip Op, 06125).

In a case to foreclose a mortgage on real property allegedly owned by the Defendant, the Nassau County Supreme Court stayed the action pending resolution of a related Surrogate's Court proceeding; and the Defendant moved to vacate the stay of foreclosure. Defendant's motion to vacate was denied (*Morreale v. Morreale*, 84 AD3d 1187, 923 NYS2d 876 [mem] [2d Dept 2011] NY Slip Op. 04433). The Court cited to *Zonghetti, supra*, asserting the risk of inconsistent adjudications (*Id.*).

In each of the above cited cases, the court enacted a CPLR §2201 stay of proceedings to prevent injustice or inconsistent decisions.

The Defendants through Counsel's affirmation in opposition requests a stay of the instant foreclosure action. The Court notes that there is no Defendants' affidavit requesting a stay and speaking to what efforts Defendants are actively engaged in, demonstrating their pursuit of resolution of the case in order to justify a stay. The Court notes that the instant foreclosure case bears a 2013 index number.

It is noted that Defendants' Counsel avers in his affirmation in opposition in support of a stay of the instant foreclosure case that "Defendants are in the process of submitting a residential mortgage modification application to the Plaintiff."

The Court also notes that same is a meaningless statement and that Defendants offer no exhibit(s) to demonstrate that such modification application has been filed, nor anything else done to warrant the granting of a stay.

The Court further takes notice that Defendants defaulted and failed to appear at the previously scheduled mandatory settlement conference March 31st, 2014. Plaintiff's Counsel correctly notes that CPLR §3408 provides a conference period during which a mortgagor is protected by a stay to discuss case resolution. Defendants failed to avail themselves of either of those foreclosure remedies.

Upon consideration of all of the foregoing in a light most favorable to the Defendants, after due consideration of all the facts and circumstances and the case history had herein, the Court declines to exercise its discretionary authority to order a stay of the instant case pursuant to CPLR §2201. Defendants' request for a CPLR §2201 stay is denied.

The Judgment of Foreclosure and Sale Order is signed simultaneous with this decision.

The foregoing decision constitutes the Order of the Court.

DATED: AUGUST 30th, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court